

ANSWERS
For JAMES CLYDE,
To the Petition of
WILLIAM CRAIG.

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December 7. 1786.

ANSWERS

FOR

JAMES CLYDE Corkcutter in Glasgow, Pursuer ;

TO THE

PETITION of WILLIAM CRAIG Timber-merchant in
Glasgow, Defender.

IN the year 1783, John Clyde the respondent's father having become bankrupt, called a meeting of his creditors ; who, after considering the comparative state of his debts and funds, agreed to accept of a composition of 15 s. in the pound, payable in two moieties, at Whitsunday 1784 and Whitsunday 1785 ; for payment of which John Clyde himself and the respondent his son granted their joint obligation.

In farther security, John Clyde disposed a piece of ground and a house to the petitioner, as trustee for his creditors ; but under an express declaration, " That the said lands shall not in any shape
" be sold or disposed of, except in the event of failure in making
A " punctual

“punctual payment of the foresaid composition of 15 s. *per* pound
“at the terms above specified.”

John Clyde, with the respondent's assistance, did all he could to pay off the creditors at the rate they had agreed to: But as they had not been able to discharge the last moiety of the composition at the precise term, the petitioner thought fit, without consulting the creditors, to expose the subject to sale on the 1st of July 1785.

The respondent, who had done as much as could well be expected of a son, in pledging his own credit for his father's debts, was naturally desirous to preserve the subject, or at least to bring it to its true value. In that view he appeared at the roup, and was preferred to the subject at L. 190 Sterling, though it had been set up at L. 140. This is made a handle of in the petition, though the respondent will own he cannot comprehend what right the petitioner has to find fault with his bidding what he considered as an adequate price, however desirous Mr Ure, who is mentioned in the petition, may have been to make a cheap purchase. Indeed, by the strain of the petition, it would have come with more propriety from Mr Ure than from the gentleman whose name it bears.

By the articles of roup, it was declared, “That the purchaser
“shall be obliged, within *ten* days after the roup, to find undoubt-
“ed security for payment of the price to the exposer, at the term
“of Martinmas next, with interest from the term of entry till
“payment, and a fifth part more of the price in name of penalty
“in case of failure; and, on the purchaser's failing to find such
“security, he shall not only forfeit his purchase, but also a fifth
“part more of the price offered in name of penalty, subject to no
“kind of deduction whatever.”

And by the fourth article, “That in case of more offers than
“one, and that the person preferred shall fail to find or grant se-
“curity as aforesaid, it shall be *competent* to the exposer of new to
“expose the subjects above described, or, *in his option*, the next and
“immediately preceding offerer shall be bound, within ten days
“after notification of such failure, not only to grant security in
“manner foresaid, but he shall also be liable in the like penalty
“and forfeiture in case of his failure so to do; and so on through
“the whole of the offers backwards, in order, shall such notifica-
“tion be made, till caution is found, and the whole articles im-
“plemented: Declaring, that the exposer shall have it in his
“power

“ power to insist upon any one of the offerers for implement and
 “ performance of the articles as he thinks fit.”

The respondent having got some intimation, that failing to find caution within the limited time might have prejudicial consequences, waited on the petitioner on the 11th of July, within which time it was certainly competent by the articles to find caution, and offered Thomas Clyde mason near Barrowfield-bridge, and Robert Masterton corkcutter in Glasgow, as his cautioners, in terms of the articles. But as this was declined by the petitioner, though the cautioners declared their readiness to undertake the obligation, the respondent made a separate offer, to pay off the debts due to the petitioner and to William Moore brickmaker in Calton, being all that remained unpaid.

This being likewise declined, the respondent took a protest against the petitioner, stating the roup and the price at which he had been preferred: “ That by the terms of the articles of roup,
 “ the purchaser was taken bound to find caution within ten days
 “ of the roup, for payment of the price payable at Martinmas
 “ first; and the exposor, on the other hand, to grant a disposition
 “ to the purchaser in the usual way: That agreeable to and in
 “ implement of the obligation incumbent on him by the said ar-
 “ ticles of roup, he then offered Thomas Clyde mason near Bar-
 “ rowfield-bridge, and William Masterton corkcutter in Glasgow,
 “ as cautioners for the price, in terms of the articles of roup, and
 “ who declared their willingness to sign a bond for that effect;
 “ or, in the option of the said William Craig, as all the debts due
 “ by the said John Clyde were settled and paid, excepting those
 “ due to Mr Craig himself and William Moore brick and tyle
 “ maker in Calton, the said James Clyde offered to pay the debt
 “ due to William Moore instantly, and grant Mr Craig a bill and
 “ undoubted caution for his debt, payable at a short date; but
 “ both of which offers the said William Craig refused to accept
 “ of.”

The answer made to this requisition is extremely material, and will be attended to by your Lordships: “ To which the said Wil-
 “ liam Craig made answer, he would not accept of the cautioners
 “ offered, nor of the foresaid bill, as he was not acquainted with
 “ the cautioners; *besides the time for finding caution limited by the ar-*
 “ *ticles of roup was elapsed*, on which account the said James Clyde
 “ *had forfeited his right to the purchase.*”

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The respondent does apprehend, that as the offer of caution for the price was made *debito tempore*, within the time limited by the articles, so it ought to have been received, though the petitioner refused it on pretence that the time for finding caution was elapsed. Independent of this, it will be a little difficult to explain for what good reason the petitioner refused to accept of security for his own and Moore's debt, though that may seem the less surprising when your Lordships will see that he even refused to accept of payment. For suspecting that, as to the second alternative, a handle might perhaps be made, as indeed is done in the petition, as if it were intended to deprive the petitioner of the subjects upon a mere offer of security for his debt, the respondent, of this date, took a second protest, stating the former: "After which re-
 July 14. 1785. " presentation, the said James Clyde exhibited *eight five pound notes*
 " of the Merchant Banking Company, and *twenty notes for one*
 " *pound* each of the same bank, and *six guinea notes* of the different
 " banks of Edinburgh and Glasgow, making in all the sum of
 " L. 66, 6 s. Sterling; which sum was counted over by me and
 " the said witnesses. And in respect the foresaid disposition was
 " granted to Mr Craig merely in security for payment of the
 " debts due to him and John Clyde's other creditors, all of which
 " were satisfied and paid except his and William Moore's as afore-
 " said, the said James Clyde therefore tendered and laid down the
 " foresaid sum of L. 66, 6 s. Sterling to the said Robertson, for Mr Craig's behoof, and demanded a reconveyance
 " to the said subject, either in favour of him the said James Clyde,
 " or John Clyde his father, after paying his Mr Craig's and Wil-
 " liam Moore's debts therefrom; but which sum the said
 " Robertson refused to accept of, as he said he had no orders so
 " to do from Mr Craig; and which offer and requisition the said
 " James Clyde also made to John Macewan writer in Glasgow,
 " Mr Craig's doer, and clerk to the said roup, who also refused to
 " accept the same; against which refusal the said James Clyde
 " protested, and that the said William Craig should not be at li-
 " berty to dispoise the said subject to any other person than the
 " said James or John Clydes; and that he should likewise be li-
 " able in all cost, skaith, damages, interest, and expences, suffered
 " or to be suffered on account of the foresaid refusal, or in seek-
 " ing redress in the premises, and for remeid in law."
 In this situation, the respondent, who seemed to run the risk of
 being

being deprived of the subject which he had bought at a full price, and offered to find caution for in terms of the articles, presented a petition and complaint to the sheriff of Lanark, praying to ordain the petitioner, on payment of his and Moore's debts, to denude of the subjects; and, in the mean time, to prohibit and discharge him from disposing them to any body else.

The sheriff granted the interdict; and, upon advising, pronounced the following interlocutor: "Having again considered the petition, answers, replies, and writings produced, appoints the petitioner to consign in the hands of the clerk of court as much money as will satisfy the debt due to the respondent and William Moore; and, upon his doing so, ordains the respondent to convey the subjects within mentioned to the petitioner, in terms of the articles of roup thereof."

Accordingly the respondent *consigned* with the clerk of court, as appears from his receipt in process, L. 66, 6 s. Sterling, being in full of the debts due to Moore and the petitioner, and of every thing that could possibly be claimed.

This, however, did not satisfy the petitioner, who offered a petition; on advising which with answers, the sheriff-substitute gave judgment in the following words: "In respect the petitioner has produced evidence that all the creditors specified in the trust-disposition are satisfied of their debts, except the defender William Moore, William Rodger, and James White; and as it is averred by the petitioner and not denied by the respondent, that Rodger's debt is suspended, and that James White never acceded to the trust-deed; finds that the respondent, on being paid the debt due to him and William Moore, must denude himself of the subjects in favour of the petitioner, the petitioner always finding caution to indemnify the respondent of any demand which Rodger and White may afterwards make upon him; and ordains the respondent to produce a state of his debt, and of that due to William Moore, within four days after this interlocutor is intimated; and with this explanation adheres to the interlocutor reclaimed against."

The petitioner once more reclaimed, insisting for the judgment of the sheriff-depute, which he got in the following interlocutor: "Having considered this petition, with the answers, former proceedings, and writs produced, and that it does not appear from the articles of roup, that upon failure of the first offerer to find
B "sufficient

“ sufficient caution, the second offerer acquired any unconditional
 “ right to the purchase of the subject in question, but on the con-
 “ trary, that the conferring such a right on him was a matter
 “ entirely optional to the defender, who appears, whatever were
 “ his motives, to have acted rigorously and precipitately in this af-
 “ fair; refuses the desire of the petition, and adheres to the inter-
 “ locutor reclaimed against; reserving to the defender action of
 “ relief against the pursuer in the event of a process of damages
 “ being brought against him by Andrew Ure, and reserving to
 “ said pursuer all competent defences.”

The petitioner, not yet satisfied, offered a bill of advocacy;
 which having been passed, and coming to be discussed before
 Lord Braxfield Ordinary, his Lordship pronounced the following
 interlocutor: “ Having heard parties procurators at great length;
 June 27. 1786. “ repels the reasons of advocacy, and remits the cause in com-
 “ mon form: Finds no expences due to the defender in the advo-
 “ cation.”

Upon a representation, which was followed with answers, the
 Aug. 2. 1786. Lord Ordinary pronounced the following interlocutor: “ Having
 “ considered this representation and answers, and representation
 “ for James Clyde; finds James Clyde intitled to the expence of
 “ his answers, which modifies to three guineas: finds him also in-
 “ titled to the expence of extract; and with these variations re-
 “ fuses the desire of both representations, and adheres to the for-
 “ mer interlocutor; and declares he will receive no more repre-
 “ sentations; but supercedes extract till the 3d federunt day of
 “ November next.”

The respondent cannot think it will be necessary to use many
 words in answer to the petition which has been offered against
 these interlocutors. Some insinuations are indeed thrown out, as
 if the effects might have afforded more than the 15s. in the pound
 which the creditors had agreed to accept of. It is said, that John
 Clyde had some reluctance to sign the conveyance of his pro-
 perty, and his family are accused of pelting the notary with stones
 when he came to take the infestment. The respondent, however,
 begs leave to deny the whole of these assertions. But though it
 must be disagreeable to him to see such insinuations thrown out
 against his father, which he knows to be altogether groundless,
 yet they are plainly extraneous to the present question, which is
 not with John Clyde the father, but with the respondent his son,
 who

who cannot think he has any reason to be ashamed for doing every thing in his power to assist his father, after he had fallen into distressed circumstances.

It is pretended in the petition, that the cautioners offered were insufficient. But here again the respondent must beg leave to differ in point of fact. The one of the persons offered was a master corkcutter, and dealer in that article, of pretty extensive business in his line; the other was a mason, and both perfectly answerable for the whole sum that was in question.

But your Lordships will observe, that it was not upon the pretended insufficiency of the cautioners that the petitioner put his answer, when the respondent required him to accept of security in terms of the articles. At that time all he said was, that he was not acquainted with the cautioners, and *that the time for finding caution was elapsed*. The first objection could easily have been removed; because the respondent could have got the cautioners attested, had not the petitioner fairly spoke out that he would not accept of caution. And the pretence on which he refused it was indeed of a very extraordinary nature. In such cases it is uncommon to take advantage of the lapse of the precise day on which it is agreed that caution shall be found. But here the time was *not* elapsed. Caution was to be found within ten days of the date of the roup, which had been held on the 1st of July, and the respondent offered his cautioners on the 11th, when they were refused, on pretence that the limited time was expired. The petitioner is a good deal at a loss what to make of this; and it is said in the petition, "There surely must be some mistake in supposing the
"representer to have said, that he considered the time for finding
"caution as elapsed, when a very short time before, on the same
"day, he had required under form of instrument that Clyde should
"find caution." That there was a strange inconsistency here, the respondent is very willing to admit; but he cannot consent that such inconsistency, on the part of the petitioner, shall be held sufficient to explain away a formal answer, solemnly and deliberately made in presence of a notary public. And upon the fact, as stated by the petitioner himself, he submits that it was extremely improper to refuse the caution offered.

Representa-
tion, p. 27.

But this is not all. For supposing a better excuse could be suggested for refusing caution for the price than has been discovered, it would remain to show for what good reason the petitioner refused

fed the offer of payment of Moore's debt, and undoubted security for his own, in the first protest; or why he refused taking payment of both in cash, when tendered to him in the second protest.

The petitioner indeed attempts to dispute the averment in the protest of 11th July, that all the debts, except Moore's and his own, had been already settled; and argues, that in that situation he could not with propriety take payment of his own debt. This argument, however, drawn from the delicacy which it is admitted ought always to be shown in the conduct of a trustee, will be found to fail in point of fact.

The creditors for whose behoof the trust-deed was granted were eight in number, viz.

William Craig the petitioner.

William Moore brickmaker.

William Rodger mason.

James Bell maltman.

John Horn farmer in Glasgow.

James White ironmonger.

John Thomson hammerman.

John M'Kechnie merchant, in right of others.

The debts due to Mr M'Kechnie were about two-thirds of the whole. And it is a certain fact, that the composition upon the debts in his person had been paid before the sale. It is true that the acknowledgment of that fact, which it was not expected would have been disputed, is dated upon the 26th of July 1785: but still it established the fact; for it is in the following words:

"Glasgow, 26th July 1785. Sir, The several debts that John Clyde portioner of Barrowfield rested me at the time he disposed his subject to you, as trustee for your own and his other creditors security of the composition agreed upon betwixt his creditors and him, he *long ago* got up all the documents of debt that I had against him; and as I have no claim upon either himself or his subjects so disposed, I leave you at full liberty to redipone the same back to him again, so far as concerns, Sir, yours, &c. JOHN M'KECHNIE.—To Mr William Craig late bailie in Glasgow."

The other creditors had received their first dividends long before the sale, though one or two of the certificates of the payment of petty debts may be subsequent to it; and there are but two creditors

creditors in all, besides the petitioner and Moore, from whom vouchers were not produced in process. These are, William Roger, a creditor in about 20s. whose debt was under suspension, and James White, a creditor in 50s. who never acceded to the trust. For these trifles the sheriff's interlocutor appoints the respondent to find caution to indemnify the petitioner; and it does not occur what pretence he could have to ask more.

It is said in the petition, that besides the petitioner's and Moore's debts, there was also something due on account of public burdens. But as to this, John Clyde had been for five years in possession before Martinmas 1785, and had paid the feu-duties regularly from Martinmas 1782, as by receipts in process. It is impossible therefore that any thing could be due upon that account, except the feu-duties for the two years preceding Martinmas 1782; but for these John Clyde's crop was sold when he was lying in prison, and the petitioner having received L. 4 : 10s. on the sale, the utmost that can remain is L. 11 : 10s, which is included in the L. 66 : 6s. consigned with the clerk. This matter, however, would fall more properly to be adjusted before the sheriff, in consequence of the remit by the Lord Ordinary; for the petitioner never could be prevailed on to state his claim, notwithstanding repeated orders for that purpose.

If, as has been seen, the debts were fully paid, it is plain the trust was at an end; and the petitioner had no more to do than to denude of the subjects. If indeed he had been seriously apprehensive of trouble from any of the creditors, his simple course was to accept of the L. 66 : 6s. when offered to him, and retain the subjects till he saw that all the debts were ultimately settled. But though, as observed in the sheriff's interlocutor, Mr Ure, as the second offerer, would not have acquired an unconditional right, even supposing the term for finding caution had been suffered to elapse, and it would have been *optional* to the petitioner whether to dispoise the subjects to him or not; yet, according to his own state of the fact, and notwithstanding the circumstances which have been mentioned, he thought fit to enter into some sort of transaction with Ure, conveying the subjects to him, and accepting of his bond for the price. If this is the fact, it will be incumbent on the petitioner to extricate himself as he best can; for as the respondent had nothing to do with the supposed transaction, and as the caution offered *debito tempore* was very improperly rejected, he cannot

not see that he is in any shape answerable for the consequence of proceedings which he did every thing in his power to prevent.

The petitioner inclines to throw out of view every thing which passed with the respondent subsequent to the 11th of July; and indeed it is of very little consequence though it were; because, upon the 11th of July, the day mentioned in the articles, the respondent had offered to find caution, but which was refused in the manner already mentioned.

In that situation it was improper for the petitioner to enter into any agreement with Andrew Ure, for conveying a subject which he had no longer any title to dispose of. The respondent, however, is informed, that the petitioner sent for Ure when he wished to convey the subject in his favour, and that the bond was written by his own man of business. If therefore he has got into any scrape with that person, he has no right to lay the blame upon the respondent, who was at the utmost pains to support his own right, who offered to find caution in terms of the articles of roup upon the 11th of July; and when that produced no effect, made another, and if possible a more unexceptionable offer, upon the 14th, to pay off in cash every shilling which his father owed to the petitioner himself, to William Moore, or any other creditor he could condescend upon.

So standing the case, it was rash to make a bargain with Ure or any other person. But the respondent flatters himself your Lordships will see no reason to delay or embarrass the petitioner's case, by calling Ure into the present action, though, if the petitioner thinks he has any claim against him, he can be at no loss to convene him in an action at his own instance. Mean while it is thought your Lordships can have no difficulty in refusing the petition, and adhering to the repeated interlocutors of the Lord Ordinary.

In respect whereof, &c.



GEO. FERGUSSON.

